Standard Chartered Bank Malaysia Bhd v Ting Kah Kuong

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–229 OF 2004-I
CLEMENT SKINNER J
30 JULY 2007

Civil Procedure — Affidavits — Contents — Sale of land — Application — Failure to state amount of interest or instalment in arrears at date of issue of originating summons and at date of affidavit — Whether fatal — Rules of the High Court 1980 O 83 r 3(3)(c)

Land Law — Conveyancing — Rectification — Mistake in payment of stamp duty — Whether solicitor's mistake attributable to bank or borrower — Land charged to bank based on lesser amount — Whether mistake could be rectified — Stamp Act 1949

Land Law — Conveyancing — Rectification — Mistake in payment of stamp duty — Land charged to bank based on lesser amount — Whether charge illegal — Whether registrar had authority to make rectification to memorandum of charge despite defendant's caveat — Whether defendant prejudiced by rectification — Sarawak Land Code (Cap 81) s 136(1)

Land Law — Sale of land — Order for — Claim for possession — Whether could grant order of possession when chargee's application was for order for sale — Whether remedy provided in s 148(2) (a), (b) and (c) of Sarawak Land Code (Cap 81) mutually exclusive — Sarawak Land Code (Cap 81) s 148(2)(a), (b), (c) — Rules of the High Court 1980 O 83 r 3(3)(c)

Legal Professions — Conflict of interest — Common solicitor — Solicitor mistakenly charged land to bank based on lower amount — Solicitor subsequently affirmed affidavits against client's case to explain mistake — Whether solicitor merely acting as witness to transactions — Whether conflict of interest

By its letter of offer dated 22 December 2001 the plaintiff bank offered the defendant and his wife banking facilities of RM245,000 consisting of an overdraft facility of RM145,000 and a housing loan of RM100,000 to purchase the land which, at that material time, was owned by one Ko Swee

Hong ('the vendor'). It was a term of the borrowing that the land would be registered in the name of the defendant alone and a third party first charge would be registered over it in favour of the plaintiff to secure the banking facility of RM245,000. Michael Ong of Messrs Michael Ong & Chang Advocates ('Michael Ong') was the common solicitor for the plaintiff, the vendor and the defendant in the sale and purchase agreement, transfer and loan documents. Michael Ong called for the release of the balance of the loan of RM193,000 as follows: (1) RM170,000 (housing loan RM48,000 and overdraft RM122,000) to the vendor; and (2) RM23,000 (balance of overdraft facility) be utilised by the defendant and his wife. When Michael Ong presented the memorandum of charge for registration he mistakenly paid the stamp duties only for RM145,000 instead of the total loan amount of RM245,000 and when the memorandum was duly registered at the Kuching Land Registry office, the memorial endorsed on the land title showed that the land was charged to the plaintiff for RM145,000 ('the memorial'). In 2003, the plaintiff, claiming that the defendant had defaulted under the charge, applied for a sale of the land. The defendant relying on what was stated in the memorial, opposed the first application for sale on the ground that the registered charge over the land only secured the sum of RM145,000 being the overdraft and not the housing loan of RM100,000. The plaintiff then discontinued the first application for sale. In the meantime, seizing on the mistake made by Michael Ong, the defendant lodged a caveat against his own piece of land on 15 September 2003. In his affidavit in support of his caveat the defendant affirmed that he had lodged his caveat to prevent the chargee or anybody from relying on s 146 of the Sarawak Land Code (Cap 81) ('the Code') from registering a memorandum of variation of charge of the principal sum secured. Michael Ong then took steps to rectify the mistake by paying the additional stamp duties for the RM100,000 whereafter the Lands and Surveys Department rectified the mistake so that it read that the land was charged to the plaintiff for RM245,000. However, the memorial retained its original date of registration ie 27 February 2002. The plaintiff again applied for an order that the land be sold by public auction under the direction of the court pursuant to s 148(2)(c) of the Code.

The defendant opposed the application on several grounds: (1) the remedy provided in items (a), (b) and (c) of s 148(2) are mutually exclusive remedies, therefore if the plaintiff wants to be repaid the monies secured by the charge, it cannot pray for possession. The defendant also submitted that the plaintiff had not complied with the requirement of O 83 r 3(3) and (4) of the Rules of the High Court 1980 ('the RHC') and O 83 r 2(3) which were mandatory requirements; (2) Michael Ong's two affidavits before the court would constitute a conflict of interest; (3) the rectification made to the memorial relating to the memorandum of charge had resulted in the memorandum of charge being illegal and unenforceable. Further, the defendant was prejudiced

by the rectification because he had already lodged a caveat against his own land and he had not received any notice as caveator, of any application to amend or rectify the register; (4) since the moneys borrowed were not credited into the defendant's account, no money was due and owing to the plaintiff under the charge; and (5) the plaintiff had failed to give the particulars required by O 83 r 3(3)(c) of the RHC.

Held, allowing the application with costs:

(1) There was no justification in the defendant's contention that the remedies provided under s 148(2) as mutually exclusive and it was also not supported by O 83 r 2(1) of the RHC. On the facts, the plaintiff sought the order of possession by way of ancillary or additional relief to complement its application for an order of sale to give any successful bidder vacant possession of the said land. The right for such an order was obtained from the charge instrument and O 83 r 1(1) of the RHC. Accordingly there was no merit in the defendant's contention that the court could not grant an order of possession when the chargee's application was for an order for sale under s 148(2)(c). Further, the plaintiff's failure to state the particulars as required under O 83 r 2(3), O 83 r 3(3) and (4) was not fatal to its application as there was no substantial prejudice resulted to the defendant (sees paras 18 & 31).

(2) There was no conflict of interests caused by the affidavits sworn by Michael Ong as he was not acting for the plaintiff in the application for sale (see paras 36–37).

(3) By s 33 and item 3 of the Third Schedule of the Stamp Act 1949 the liability to pay the stamp duty was that of the chargor or mortgagor ie the defendant. On the facts, Michael Ong was clearly acting on behalf of the defendant and not the plaintiff in the payment of the stamp duties payable on the memorandum of charge. The mistake, if any, was attributable to the defendant and therefore the acts that gave rise to the requirement for rectification were that of the defendant (see paras 39–40).

(4) The omission to pay the correct stamp duty did not render the memorandum of charge or annexure of charge unenforceable, illegal or void in anyway since it is well settled that the omission to pay stamp duty on any document would only result in the court impounding such a document until the correct duty was paid. On the facts, Michael Ong had already taken steps to pay the proper stamp duty on the memorandum of charge even before the proceedings and therefore the question of the court impounding the charge instrument did not arise at all (see paras 41–42).

(5) The authority to make the rectification was derived from s 136(1) of the Code. It was not open for the defendant to launch a collateral attack on the decision of the registrar to make the rectification, when, he had not brought any proceedings for the purpose of impugning the decision. All the registrar was doing was to reflect the correct amount of the security stated in the memorandum of charge in respect of the earlier entry on the record. Further, the caveat lodged by the defendant, in breach and disregard of the clause of the annexure of charge, was only for the purpose of preventing the registration of a memorandum of variation of charge under s 146 of the Code. In the circumstances, there was no merit in the defendant's complaints (see paras 44–46).

(6) The banking facilities had been paid directly to the vendor in accordance with the instructions of the defendant's lawyer and there was no complaint whatsoever from the defendant regarding the disbursements. Thus, the defendant's attempt to deny that he had authorised Michael Ong to call for the release of the banking facilities was a self serving afterthought which could not be given any credence by the court (see para 54).

(7) Further, the omission by the plaintiff to provide the particulars required under O 83 r 3(3)(c) was minor because the amount of the arrears for the overdraft as at the date of the affirmation of the affidavit was the same as the amount owing at the date on which the originating summons was issued and conversely the amount of interest in arrears for the housing loan as at the date of the issuance of the originating summons was the same as the amount owing as at the date of affirmation of the affidavit. The defendant had also not suffered any prejudice by the omission (see paras 58–59).

[Bahasa Malaysia summary

Melalui surat tawarannya bertarikh 22 Disember 2001 plaintif bank telah menawarkan defendan dan isterinya kemudahan perbankan RM245,000 yang mengandungi kemudahan overdraf RM145,000 dan pinjaman perumahan RM100,000 untuk membeli tanah yang, pada masa matan, dimiliki oleh Ko Swee Hong ('pembeli'). Ia suatu terma pinjaman bahawa tanah tersebut akan didaftarkan dalam nama defendan seorang dan gadaian pertama pihak ketiga akan didaftarkan ke atasnya bagi pihak plaintif untuk menjamin kemudahan perbankan RM245,000. Michael Ong daripada Tetuan Michael Ong & Chang Associates ('Michael Ong') merupakan peguam bersama untuk plaintif, penjual dan defendan dalam perjanjian jualbeli, dokumen-dokumen pemindahan dan pinjaman. Michael Ong telah meminta pelepasan baki pinjaman RM193,000 seperti berikut: (1) RM170,000 (pinjaman perumahan RM48,000 dan overdraf RM122,000)

kepada pembeli, dan (2) RM23,000 (baki kemudahan overdraf) digunakan oleh defendan dan isterinya. Apabila Michael Ong mengemukakan memorandum gadaian untuk pendaftaran beliau tersilap membayar duti setem hanya untuk RM145,000 dan bukan untuk jumlah keseluruhan RM245,000 dan apabila memorandum itu didaftarkan di Pejabat Pendaftaran Tanah Kuching, peringatan yang diindorskan atas hak milik tanah menunjukkan bahawa tanah tersebut dicagarkan kepada plaintif untuk RM145,000 ('peringatan tersebut'). Pada 2003, plaintif, menuntut bahawa defendan yang telah gagal di bawah gadaian tersebut, telah memohon untuk satu jualan tanah tersebut. Defendan bergantung kepada apa yang dinyatakan dalam peringatan tersebut, membantah permohonan pertama untuk jualan tersebut atas alasan bahawa gadaian yang didaftarkan ke atas tanah tersebut hanya menjamin jumlah RM145,000 yang merupakan overdraf dan bukan pinjaman perumahan sejumlah RM100,000. Plaintif kemudiannya tidak meneruskan permohonan pertama untuk jualan itu. Sementara itu, dengan mengambil kesempatan terhadap kesilapan yang dibuat oleh Michael Ong, defendan telah memasukkan kaveat terhadap sekeping tanahnya sendiri pada 15 September 2003. Dalam afidavit sokongan terhadap kaveatnya defendan mengesahkan bahawa beliau telah memasukkan kaveatnya untuk menghalang pemegang gadaian atau sesiapapun daripada bergantung kepada s 146 Kanun Tanah Sarawak (Bab 81) ('Kanun tersebut') daripada mendaftar satu memorandum pengubahan gadaian jumlah utama yang dicagarkan. Michael Ong kemudian telah mengambil langkah untuk membetulkan kesilapan dengan membayar duti setem tambahan sebanyak RM100,000 yang mana Jabatan Tanah dan Ukur telah membetulkan kesilapan itu agar ia dibaca bahawa tanah dicagarkan kepada plaintif untuk RM245,000. Namun begitu, memorandum tersebut mengekalkan tarikh asal pendaftarannya iaitu 27 Februari 2002. Plaintif sekali lagi telah memohon untuk satu perintah agar tanah itu dijual melalui lelongan awam di bawah arahan mahkamah menurut s 148(2)(c) Kanun tersebut.

Defendan telah membantah permohonan tersebut atas beberapa alasan: (1) remedi yang diperuntukkan dalam item (a), (b) dan (c) s 148(2) semuanya remedi eksklusif, oleh itu jika plaintif ingin dibayar semula wang yang dicagarkan oleh gadaian itu, ia tidak boleh memohon pemerolehan. Defendan juga berhujah bahawa plaintif tidak mematuhi keperluan A 83 k 3(3) dan (4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan A 83 k 2(3) yang mana adalah keperluan yang mandatori; (2) kedua-dua afidavit Michael Ong di hadapan mahkamah akan membentuk konflik kepentingan; (3) pembetulan yang dibuat pada peringatan berkaitan memorandum gadaian telah mengakibatkan memorandum gadaian tersebut menyalahi undang-undang dan tidak boleh dikuatkuasakan. Seterusnya, defendan diprejudiskan oleh pembetulan tersebut kerana beliau telahpun memasukkan kaveat terhadap tanahnya sendiri dan beliau tidak menerima sebarang notis sebagai pengkaveat, tentang apa-apa permohonan untuk meminda atau

membetulkan buku daftar; (4) memandangkan wang yang diberikan pinjaman itu tidak dikreditkan ke dalam akaun defendan, tiada wang perlu dibayar dan terhutang kepada plaintif di bawah gadaian tersebut; dan (5) plaintif telah gagal untuk memberikan butiran yang diperlukan oleh A 83 k 3(3)(c) KMT.

Diputuskan, membenarkan permohonan dengan kos:

(1) Tidak terdapat justifikasi dalam hujahan defendan bahawa remedi-remedi yang diperuntukkan di bawah s 148(2) sebagai sama-sama eksklusif dan ia juga tidak disokong oleh A 83 k 2(1) KMT. Atas fakta, plaintif memohon perintah untuk milikan melalui relief sampingan atau tambahan untuk melengkapkan permohonannya untuk perintah jualan untuk memberikan seseorang penawar yang berjaya, milikan kosong tanah tersebut. Hak untuk perintah sedemikian diperoleh daripada instrumen gadaian dan A 83 k 1(1) KMT. Oleh itu, tidak ada merit dalam hujahan defendan bahawa mahkamah tidak boleh memberikan perintah milikan apabila permohonan pemegang gadaian adalah untuk perintah jualan di bawah s 148(2)(c). Selanjutnya, kegagalan plaintif untuk menyatakan butiran seperti yang diperlukan di bawah A 83 k 2(3), A 83 k 3(3) dan (4) tidak menjejaskan permohonannya kerana tidak terdapat prejudis yang substansial terhadap defendan (lihat perenggan 18 & 31).

(2) Tidak berlaku konflik kepentingan akibat daripada afidavit-afidavit yang disumpah oleh Michael Ong kerana beliau tidak bertindak bagi pihak plaintif dalam permohonan penjualan (lihat perenggan 36–37).

(3) Menurut s 33 dan item 3 Jadual Ketiga Akta Setem 1949, liabiliti untuk membayar duti setem adalah pada penggadai atau penggadai janji iaitu defendan. Atas fakta, Michael Ong jelas bertindak bagi pihak defendan dan bukan plaintif dalam pembayaran duti setem yang perlu dibayar terhadap memorandum gadaian. Kesilapan, jika ada, adalah berpunca daripada defendan dan oleh itu tindakan-tindakan yang membawa kepada keperluan untuk pembetulan adalah disebabkan oleh defendan. (lihat perenggan 39–40).

(4) Kegagalan membayar duti setem tidak menjadikan memorandum gadaian atau lampiran gadaian tidak boleh dilaksanakan, menyalahi undang-undang atau batal dalam apa carapun kerana ia adalah jelas bahawa kegagalan membayar duti setem terhadap apa-apa dokumen hanya akan menyebabkan mahkamah mengimpaun dokumen tersebut sehingga duti sebenar dibayar. Atas fakta, Michael Ong telah mengambil langkah-langkah untuk membayar duti setem yang sebenar atas memorandum gadaian sebelum prosiding dan oleh yang demikian

persoalan untuk mahkamah mengimpaun instrumen gadaian tersebut tidak berbangkit sama sekali (lihat perenggan 41–42).

(5) Kuasa untuk membuat pembetulan didapati daripada s 136(1) Kanun tersebut. Ia tidak terbuka kepada defendan untuk melancarkan serangan kolateral terhadap keputusan pendaftar untuk membuat pembetulan, apabila, dia tidak membawa sebarang tindakan untuk mempersoalkan keputusan tersebut. Apa yang pendaftar lakukan hanyalah semata-mata untuk menunjukkan jumlah yang betul terhadap sekuriti yang dinyatakan di dalam memorandum gadaian berkaitan dengan kemasukan terdahulu atas rekod. Selanjutnya, kaveat yang dimasukkan oleh defendan, dalam kemungkiran dan tanpa mengendahkan klausa di dalam lampiran gadaian, hanya bertujuan untuk menghalang pendaftaran memorandum variasi gadaian di bawah s 146 Kanun tersebut. Dalam keadaan tersebut, tidak ada merit dalam aduan defendan (lihat perenggan 44–46).

(6) Pinjaman perbankan telah dibayar terus kepada penjual menurut arahan peguam defendan dan tidak ada sebarang aduan daripada defendan berkenaan dengan pembayaran tersebut. Oleh itu, cubaan defendan untuk menafikan bahawa dia telah memberi kuasa kepada Michael Ong untuk pembayaran pinjaman bank tersebut adalah sesuatu yang difikirkan kemudian yang tidak boleh dipercayai oleh mahkamah (lihat perenggan 54).

(7) Selanjutnya, kegagalan plaintif untuk memberikan butir-butir yang diperlukan di bawah A 83 k 3(3)(c) adalah kecil kerana jumlah tunggakan untuk overdraf pada tarikh pengesahan afidavit adalah sama dengan jumlah yang terhutang pada tarikh pengeluaran saman pemula dan sebaliknya faedah atas tunggakan untuk pinjaman perumahan pada tarikh pengeluaran saman pemula adalah sama seperti jumlah yang dihutangkan pada tarikh pengesahan afidavit. Defendan juga tidak mengalami apa-apa prejudis atas kegagalan tersebut (lihat perenggan 58–59).]

Notes

For a case on conflict of interest of common solicitor generally, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1573.

For a case on rectification, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2603.

For cases on contents of affidavits, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 366–380.

For cases on order for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4131–4234.

Cases referred to

Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd [2003] 3 MLJ 321 (refd)
Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors [1982] 1 MLJ 198 (refd)

Legislation referred to

Rules of the High Court 1980 O 2 r 2(3), O 83 rr 1(1), 2(1), (3), 3(1), (3), (3)(c), (4)
Sarawak Land Code (Cap 81) ss 136, 136(1), 146, 148, 148(2), 148(2)(a), (b), (c)
Stamp Act 1949 s 33, item 3, Third Schedule

Arthur Lee (Lee Lin & Co Advocates) for the plaintiff.
Marina Foo (Marina Foo Advocates) for the defendant.

Clement Skinner J:

[1] This is the hearing of an application by Standard Chartered Bank Malaysia Bhd ('the plaintiff') for an order that a land described as Lot 1658 Block 226 Kuching North Land District ('the said land') which is owned by Ting Kah Kuong ('the defendant') be sold by public auction under the direction of the court pursuant to s 148(2)(c) of the Sarawak Land Code ('the Code').

[2] The facts leading up to this application are these.

[3] By its letter of offer dated 22 December 2001 the plaintiff offered the defendant and his wife (Madam Tan Wui Kheng) banking facilities of RM245,000 consisting of an overdraft facility of RM145,000 and a housing loan of RM100,000, upon the terms and conditions stated in the letter of offer.

[4] The purpose of the banking facilities, which was duly accepted by the defendant and his wife, was to finance their purchase of the said land which, at that material time, was owned by one Ko Swee Hong ('the vendor'). It was a term of the borrowing that the said land would be registered in the name of the defendant alone and a third party first charge would be registered over it in favour of the plaintiff to secure the banking facility of RM245,000.

[5] Prior to obtaining the banking facilities from the plaintiff, the defendant had entered into a sale and purchase agreement with the vendor on 26 November 2001 in respect of the said land, which has a double storey detached house built on it. The solicitor who acted for the vendor and the defendant in that transaction was Mr Michael Ong Kee Tuan of Messrs

Michael Ong & Chang Advocates. Mr Michael Ong also acted as the solicitor for the plaintiff and the defendant in preparing the loan documentation including the memorandum and annexure of charge for the banking facilities granted to the defendant. He has affirmed an affidavit in these proceedings in which he states the following facts.

[6] The said land was sold for RM420,000 by the vendor to the defendant. At that time, the said land was charged to Hong Leong Bank Bhd, by the vendor and the redemption sum was RM52,000 as at 28 February 2002. The defendant obtained approval of the banking facilities of RM245,000 to part finance the purchase of the said land. Mr Michael Ong states that pursuant to the sale and purchase agreement and as with normal practice and with authority of the vendor and the defendant, Messrs Michael Ong called for the release of the defendant's loan to settle the redemption sum of RM52,000 due to Hong Leong Bank Bhd which the plaintiff duly did and which Mr Michael Ong sent to Hong Leong Bank on 7 February 2002.

[7] Mr Michael Ong further states that upon acceptance for registration of the memorandum of transfer and memorandum of charge by the Lands and Surveys Department, as with normal practice and pursuant to the sale and purchase agreement and authorised by the vendor and the defendant, his firm called for the release of the balance of the loan of RM193,000 as follows:

(a) RM170,000 (housing loan RM48,000 and overdraft RM122,000) to the vendor;

(b) RM23,000 (balance of overdraft facility) be utilised by the defendant and his wife.

[8] When Messrs Michael Ong & Chang presented the memorandum of charge for registration they mistakenly paid stamp duties only for RM145,000 instead of the total loan amount of RM245,000 with the result that when the memorandum was duly registered at the Kuching Land Registry office on 27 February 2002 as Instrument No L 3997/2002, the memorial endorsed on the land title shows that the said land was charged to the plaintiff for RM145,000 ('the memorial').

[9] In 2003, the plaintiff, claiming that the defendant had defaulted under the charge applied for a sale of the said land vide originating summons No 22–125 of 2003-II dated 21 April 2003 ('the first application for sale'). The defendant relying on what was stated in the memorial, opposed the first application for sale on the ground that the registered charge over the said land only secured the sum of RM145,000 being the overdraft and not the housing loan of RM100,000. The plaintiff then discontinued the first application for sale.

[10] The present lawyers acting for the plaintiff then wrote to Messrs Michael Ong & Chang at the end of July 2003 enquiring about the loan amount stated in the memorial relating to charge Instrument No L 3997/2002. It must have been then that Messrs Michael Ong & Chang realised their mistake in having paid stamp duties only for RM145,000 and not RM245,000, hence the endorsement of the memorial for only RM145,000.

[11] In the meantime, seizing on the mistake made by Messrs Michael Ong & Chang the defendant lodged a caveat against his own piece of land ie the said land on 15 September 2003. In his affidavit in support of his caveat the defendant affirmed that he had lodged his caveat to prevent the chargee or anybody from relying on s 146 of the Code from registering a memorandum of variation of charge of the principal sum secured.

[12] Mr Michael Ong explained that his firm then took steps to rectify the mistake made by paying the additional stamp duties for the RM100,000 whereafter the Lands and Surveys Department rectified the mistake. The Lands and Surveys Department did so by rectifying the memorial in respect of Instrument No L 3997/2002 so that it now reads that the said land was charged to the Standard Chartered Bank Malaysia Bhd for RM245,000. The memorial in respect of Instrument No L 3997/2002 retained its original date of registration ie 27 February 2002.

[13] Reverting now to the present application, it is the plaintiff's case that the defendant and his wife have exceeded the overdraft facilities limit and failed to make the monthly instalments due for the housing loan under the memorandum of charge Instrument No L 3997/2002 and the balance owing by the defendant and his wife as at 6 April 2004 were RM169,023.78 (overdraft as at 5 April 2004) and RM115,940.19 (housing loan as at 5 April 2004) respectively. Accordingly the defendant was in default under the terms of the charge.

[14] By letter dated 6 April 2004 the plaintiff, through its advocates, demanded payment by the defendant of the outstanding sums and interest from the defendant within 30 days from the date of receipt of the said letter by the defendant. The defendant was also notified in the said letter that if he failed to pay the sum demanded within the time allowed, the plaintiff would exercise all its remedies including an application to court for the sale of the said land under s 148 of the Code. The said letter was duly sent to the defendant by AR registered post. As proof of posting the plaintiff has exhibited the receipts issued by the postal authorities in respect of the said letter.

[15] The defendant did not pay the plaintiff any sums as requested from him.

[16] On 22 June 2004 the plaintiff filed this application. In addition to its principal relief applied for ie an order for sale of the said land, the plaintiff has also prayed for an order that the defendant and all persons claiming to be entitled to or occupying the said land shall deliver or cause to be delivered vacant possession of the said land to the plaintiff forthwith.

[17] The defendant opposes the application on several grounds. I shall deal with each in turn.

Defendant's objection to plaintiff's application for delivery of possession of the said land

[18] The defendants raised this ground as a preliminary objection and took three points on this ground. First, he said that a reading of s 148(2) of the Code shows that on a chargor failing to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court:

(a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for the sale of the charged land.

[19] Based on what is stated in the section, counsel for the defendant contended that the remedy provided in items (a), (b) and (c) of the section are mutually exclusive remedies because of the word 'or', so that if the plaintiff wants to be repaid the monies secured by the charge, it cannot pray for possession.

[20] I find no merit in this contention.

[21] Whilst I would agree that in instances where a chargor chooses to be put into possession of the charged land and be registered as the proprietor thereof as his substantive relief, such a chargor would naturally not apply for a sale of the charged land since that is inconsistent with the remedy he seeks, this does not mean that the remedies stated in (a), (b) and (c) are mutually exclusive as alleged. Take for instance where the charged land is let out by the chargor for huge profits, I see no legal impediment to the chargor applying for a sale of the charged land and pending the order for sale to also apply for an order to receive the rents and profits of the charged land.

[22] The defendant's contention is also not supported by what is stated in O 83 of the Rules of the High Court 1980 ('the RHC') itself. In O 83 r 2(1) it is stated:

> Where in a charge action begun by originating summons, being an action in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured by the charge *or both* …

[23] Again in r 3(1) those same words appear. The rule reads:

> (1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.
>
> This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge *or both*.

[24] Accordingly there can be no justification for reading the remedies provided by s 148(2) of the Code as mutually exclusive as the defendant wishes to.

[25] The second point taken by the defendant on this ground was that, if the plaintiff choses the remedy provided by s 148(2)(c) ie for the sale of the charged land, then the court cannot grant the plaintiff's claim for possession of the said land because sub-s (2)(c) only mentions that the court may order a sale of the charged land and not give possession as well. I do not agree. Here the plaintiff is seeking the order of possession by way of ancillary or additional relief to complement its application for an order of sale for good and practical reasons — to give any successful bidder vacant possession of the said land.

[26] The right of the plaintiff to obtain such an order and for the court to grant it arises from two sources. First, the terms of the charge instrument itself. By cl 7.03 of the charge the defendant agreed that:

> When the power of sale pursuant to the provisions of the Land Code becomes exercisable by the chargee, the chargor hereby declares and agrees that the chargor will deliver or cause the delivery of vacant possession of the land to the chargee or any person authorised immediately on receiving written demand in their behalf by the chargee.

[27] The service of the originating summons in this application would, in my judgment, constitute such written demand. The second source of power for the court to grant such an order is found in O 83 r 1(1) itself which states:

(i) This order applies to any action … in which there is a claim for any of the following reliefs namely —

(a) …

(b) …

(c) …

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is in or is alleged to be in possession of the property;

(e) …

(f) …

[28] Accordingly there can be no merit in the defendant's contention that the court cannot grant an order of possession when the chargee's application is for an order for sale under s 148(2)(c) of the Code.

[29] The third point taken by the defendant on this ground was that the plaintiff had not, in its affidavit affirmed in support of its application stated 'the circumstances under which the right to possession arises' nor given 'particulars of every person who to the best of the plaintiff's knowledge is in possession of the charged property' which particulars are required by O 83 r 3(3) and (4) nor had the plaintiff 'endorsed on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant that the plaintiff intends at the hearing to apply' for an order of possession which is a requirement of O 83 r 2(3). According to the defendant these are mandatory requirements of the rules which must be complied with.

[30] Whilst I agree that the plaintiff has not stated these particulars as required, I do not find that the plaintiff's failure to do so is fatal to its application. The defendant has simply in his submissions raised these objections without saying a word about what, if any, prejudice he has suffered by these omissions of the plaintiff. By O 2 r 2(3) of the RHC the court will not allow preliminary objections for non-compliance with the rules of court unless such non-compliance has occasioned a substantial miscarriage of justice. With regard to the defendant's contention that the particulars which he refers to are mandatory requirements under the rules, I would refer to the

judgment of the Court of Appeal in *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321 where His Lordship Gopal Sri Ram JCA said this on the matter (at p 328):

> [T]he courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. When a party to litigation complains of breach of a procedural provision by his opponent, the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question that the judicial arbiter should ask himself is what injustice the party complaining has suffered by reason of the procedural breach. The answer to this question ultimately determines whether the court should uphold or reject a procedural complaint (*Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329 followed).

[31] Reverting to the application before me, I do not see any substantial prejudice which has resulted to the defendant from the omission of the plaintiff. I say so for the following reasons: With regard to circumstances under which the plaintiff's right to possession arises, the plaintiff did exhibit to its application a copy of the annexure of charge in which cl 7.03 clearly states that the plaintiff's right to delivery of vacant possession of the said land arises 'when the power of sale pursuant to the provisions of the Code becomes exercisable'. The defendant must be taken as being fully aware of this right.

[32] With regard to the particulars of every person in possession of the said land, in the absence of such particulars having been provided by the plaintiff, the court, in considering whether or not to grant such an order is entitled to inform itself from the documents before it about such particulars. Here, by cl 4.01 (h) of the annexure of charge the defendant had covenanted not to howsoever part with the possession of the said land or any building thereof without the consent in writing of the plaintiff. In the absence of any evidence before the court that the defendant had obtained the written consent of the plaintiff to part with possession of the said land, the court is entitled to infer that the particulars of the person in possession of the said land will relate to the defendant and his wife who obtained the banking facilities to specifically buy the said land.

[33] With regard to the plaintiff's failure to endorse on the outside fold of its affidavit a notification that it was applying for possession, no substantial prejudice could have been occasioned to the defendant by the plaintiff's omission because such omission was one that went to form rather than substance because the defendant would be notified from reading prayer (d) of the originating summons itself that the plaintiff was claiming delivery of vacant possession of the said land from him.

[34] Accordingly I see nothing in the points raised by the defendant on this ground taken by way of preliminary objection to the plaintiff's application and dismiss them.

[35] Turning now to the substantive application for sale, the defendant raised the following objections to it.

Defendant's objections to the affidavits affirmed by Mr Michael Ong being read in these proceedings

[36] The defendant contended that Mr Michael Ong should not have affirmed the two affidavits which he did in these proceedings as it would constitute a conflict of interest if he did so. I do not agree.

[37] Mr Michael Ong has very properly come forward to state that he was the common solicitor for the plaintiff, the vendor and the defendant in the sale and purchase agreement, transfer and loan documents. He is the person with first hand knowledge of the matters he averred to. I agree with Mr Arthur Lee of counsel for the plaintiff that in affirming his affidavits in this case, Mr Ong does so as a witness to the transactions and there can be no conflict of interest in his doing so especially where he has come forward to narrate what actually happened in the transactions. Further, Mr Michael Ong is not acting for the plaintiff in this application for sale.

Defendant's contention that the rectification made to the memorial relating to the memorandum of charge Instrument No L 3997/2002 has resulted in the memorandum of charge being illegal and unenforceable

[38] It is the contention of the defendant that the plaintiff has behaved inequitably in obtaining a rectification of the memorial by the Lands and Surveys Department to reflect that the charge was to secure the sum of RM245,000 and not RM145,000 as originally reflected on the title. Accordingly it is alleged that the plaintiff has come to court with unclean hands.

[39] In support of his contention the defendant took three points: The first point was that the mistake, if any, in paying the correct stamp duties was made on the part of the solicitor (Mr Michael Ong) who was acting for and on behalf of the plaintiff and so the rectification sought was to remedy the plaintiff's solicitors' mistake. I do not agree. Both in law and by contract, the party that was under a legal liability and obligation to pay the correct stamp duties in this case was the defendant himself. By s 33 and item 3 of the Third Schedule of the Stamp Act 1949 (Act 378 which was extended to Sarawak in

1 October 1989) the liability to pay the stamp duty is that of the chargor or mortgagor ie the defendant. By cl 9.05 of the annexure of charge the defendant covenanted that, 'The chargor shall pay all stamp duties … incidental to the execution, issue, delivery and registration of this charge (including any penalties for late payment thereof) — …'. So Mr Michael Ong was clearly acting on behalf of the defendant and not the plaintiff in the payment of the stamp duties payable on the memorandum of charge. His 'mistake', if any, was attributable to the defendant and not to the plaintiff.

[40] It will be seen from the above that the memorial which was originally recorded against the title to the said land stating that the charge was to secure only RM145,000 instead of the sum of RM245,000 which was the amount actually lent to the defendant and his wife, came about as a result of the acts of the defendant's own agent. Therefore, the acts gave rise to the requirement for rectification were that of the defendant. The plaintiff's hands are totally 'clean' in this regard.

[41] The second point taken by the defendant on this ground was that the whole exercise of the plaintiff in making the rectification has resulted in the memorandum of charge becoming illegal and unenforceable. According to the defendant under the Torrens system of land administration, which the Code has adopted, registration is the cornerstone of the system. It gives certainty to title to land which anyone making a search against the title may rely on. However, the defendant complains that in this case, because of the rectification made by the Lands and Surveys Department to the memorial endorsed on the title to the said land, this has resulted in an entry being made on the record of two different amounts being registered on the same date and time. Accordingly it was argued on behalf of the defendant that any order for sale granted 'in such a scenario' will rock the very foundation of the Code. I do not agree.

[42] Mr Michael Ong has explained the circumstances in which he requested the Lands and Surveys Department to rectify the endorsement on the title arising out of the omission to pay the correct amount of stamp duty on the memorandum of charge. In my judgment the omission to pay the correct stamp duty did not render the memorandum of charge or annexure of charge unenforceable, illegal or void in anyway since it is well settled that the omission to pay stamp duty on any document will only result in the court impounding such a document until the correct duty is paid (see the decision of the Federal Court in *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198, particularly at p 202 para 'B' left). But here Mr Ong had already taken steps to pay the proper stamp duty on the memorandum of charge even before these proceedings and so the question of the court impounding the charge instrument did not arise at all.

[43] There was also nothing suspicious or improper about Mr Ong paying the proper stamp duty on the memorandum of charge at a later date. This is permitted on payment of a penalty under the Stamp Act 1949.

[44] With regard to the authority of the Lands and Surveys Department to make the rectification it did, s 136(1) of the Code states that:

> Subject to any rules made under section 213, the Registrar may, upon such evidence as appears to him sufficient, correct errors or omissions in any document of title or other instrument, or in the Register, and may make any entry necessary to supply any such omission, and any errors so corrected or entries so supplied shall have the like validity and effect as if such error or omission had not been made, except as regards any entry in the Register prior to the actual time of correcting that error or omission.

[45] Clearly from what is stated in s 136(1), the registrar had the authority to make the rectification which he made 'upon such evidence as appears to him sufficient'. The registrar having made the rectification complained of which the defendant knew about from the time of the first application for sale, it is not open to the defendant in these proceedings to launch a collateral attack against the decision of the registrar to make the rectification when the defendant has not brought any proceedings for the purpose of impugning that decision.

[46] It is also not factually correct for the defendant to say that the rectification made by the registrar has resulted 'in an entry on the record of two different amounts being registered on the same date and same time'. Anyone conducting a search on the title after the rectification was made will find only one entry relating to the correct amount of the security.

[47] The third point taken by the defendant on this ground was that he was prejudiced by the rectification because he had already lodged a caveat against his own land and he had not received any notice as caveator, of any application to amend or rectify the register. The defendant referred to the power of the registrar to make rectification under s 136 which states that the rectification shall be made and 'any errors so corrected or entries so supplied shall have the like validity and effect as if such error or omission had not been made *except as regards any entry in the register prior to the actual time of correcting that error or omission*'.

[48] Referring to the words in highlight, counsel for the defendant said the caveat lodged by the defendant constituted such an entry on the register and

therefore the registrar was wrong to rectify the register without first giving him notice of the registrar's intention to do so by virtue of which he has been prejudiced. I do not agree.

[49] In the first place the registrar was making a rectification in respect of an entry which appeared on the register well before the entry of the defendant's caveat on the register. All the registrar was doing was to reflect the correct amount of the security stated in the memorandum of charge in respect of that earlier entry on the record. In the second place, it lies ill in the mouth of the defendant to complain about prejudice to him as a caveator when he lodged that caveat in blatant breach and disregard of cl 3.04 (a) of the annexure of charge where he covenanted that:

> (a) the chargor shall not during the subsistence of this charge without the prior consent in writing of the chargee execute any form of charge, mortgage, debenture, pledge, lien or security, interest *or permit to exist any caveat or prohibitory order or both in respect of the Land.*

[50] In the third place, the wrongful caveat which the defendant lodged was for the purpose only of preventing the registration of a memorandum of variation of charge under s 146 of the Code, which is not what the registrar has effected in this case on application by Mr Michael Ong.

[51] For all the above reasons I found no merit in any of the defendant's complaints on this ground.

Defendant's contention that since the moneys he and his wife borrowed were not credited into their account, no money is due and owing to the plaintiff under the charge

[52] The defendant has advanced this rather startling proposition because the moneys which he and his wife borrowed from the plaintiff for the very purpose of purchasing the said land was released or paid over by the plaintiff directly to the vendor instead of to him and his wife. According to the defendant, the plaintiff should have first paid the money into his and his wife's accounts so that they could disburse or use it as they please. I see absolutely no merit in this proposition.

[53] According to the defendant he never authorised the plaintiff to pay over the moneys to the vendor of the said land. But that is not what his own lawyer states. Mr Michael Ong who acted for the defendant in the sale and purchase agreement and memorandum of transfer affirmed on oath that, 'pursuant to the sale and purchase agreement and as with normal practice and

with authority of the vendor and the defendant herein, we called release of the defendant's loan to settle the redemption sum due (RM52,000) to Hong Leong Bank Bhd', and Mr Michael Ong also averred on oath that, 'Upon acceptance for registration of the memorandum of transfer and memorandum of charge by Lands and Surveys, and as with normal practice and pursuant to the sale and purchase agreement and authorised by the vendor and the defendant, we called release of the balance loan of RM193,000 as follows …'.

[54] Clearly then, apart from the sum of RM23,000 (which was credited into the defendant and his wife's account) the rest of the banking facilities were released to the defendant but paid over directly to the vendor in accordance with the instructions of the lawyer acting for the defendant and his wife. Mr Michael Ong has affirmed in his affidavit that he has not received any complaint whatsoever from the defendant or any party regarding the disbursement of the overdraft and housing loan amounting to RM245,000 since its disbursement in February 2002 until this application was made. In my judgment, the release of the banking facilities to the vendor was for the benefit of the defendant who has over all these years approbated Mr Michael Ong's call for the release of the banking facilities to the vendor of the said land. It is unconscionable for the defendant to now reprobate the same. The defendant's attempt to deny that he had authorised Mr Michael Ong to call for the release of the banking facilities is a self serving afterthought which cannot be given any credence by the court.

[55] It must follow from what I have just said that I find no merit in the defendant's complaint that since the banking facilities were not credited to his account, the plaintiff's statutory demand which was served on the defendant under s 148 of the Code was ineffectual and invalid because it claimed for the repayment of moneys not lawfully due from the defendant.

Defendant's contention that the plaintiff had failed to give the particulars required by O 83 r 3(3)(c)

[56] This sub-rule requires the plaintiff to state 'the amount of any interest or instalment in arrears at the date of the issue of the originating summons and at the date of the affidavit'. According to the defendant the plaintiff has not stated these particulars. In her supplementary affidavit affirmed on 9 September 2004 Ms Lin Kueh Hong has affirmed on behalf of the plaintiff that:

> In further clarification of cl 9 of the affidavit of Wong Sze Mun and pursuant to O 83 r 3(3) and (6), I affirm that the amount of interest in arrears and instalments in arrears payable by the defendant as at the date of the issue of the originating

summons and as at the date of the affirmation of affidavit by Wong Sze Mun is RM26,898.07 (overdraft) and RM30,411.81 (housing loan) respectively.

[57] But counsel for the defendant has argued that the particulars provided in that paragraph are still defective because the plaintiff has only given the amount of the overdraft in arrears as at the date of the issuance of the originating summons but not at the date of the affirmation of the affidavit, and, the amount of the housing loan in arrears was given as at the date of affirmation of the affidavit but not at the date of the issuance of the originating summons. Accordingly the defendant contended that he is prejudiced by this omission.

[58] I find that the omission complained of here is very minor in nature and can be cured. This is not a case where the plaintiff has completely ignored the particular rule in question. The plaintiff has in fact tried to comply with the rule by supplying one part of the particulars required by the rule but not the other part. The omission is minor because, as explained by counsel for the plaintiff, the amount of the arrears for the overdraft as at the date of the affirmation of the affidavit was the same as the amount owing at date on which the originating summons was issued ie RM26,898.06, and conversely the amount of the interest in arrears for the housing loan as at the date of the issuance of the originating summons was the same as the amount owing as at the date of affirmation of the affidavit ie RM30,411.81 as those two dates ie 16 June 2004 and 22 June 2004 fall within the same month.

[59] According to counsel, the defendant was prejudiced by such omission because he has come to court with no indication as to exactly how much he should pay in the event that he decides not to defend the case but to redeem the charge on the hearing date. I do not agree. The defendant has never said in any of his affidavits filed in these proceedings that he wished to redeem the charge but was unable to do so because of the omission complained of. Further, the plaintiff's application does state the exact amounts claimed from the defendant. If he really wanted to redeem the charge as alleged the defendant knew what the plaintiff was claiming as payable from him to do so. The defendant could not therefore have suffered any prejudice as alleged by the omission complained of.

[60] In the result, having considered all the matters put before me, I find that the appropriate order to make as in the circumstances seems just is to grant the plaintiff's application for sale in the terms applied for with costs.

Application allowed with costs.

Reported by Loo Lai Mee